TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]12

LOUIS H. EBERLEIN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 18, 1918.

(26,652)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 566.

LOUIS H. EBERLEIN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

DD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 10, 1919.

1 I. *Petition. Filed May 25, 1916.*

In the Court of Claims.

No. 33266.

LOUIS H. EBERLEIN

vs.

THE UNITED STATES.

Petition.

To the Chief Justice and Judges of the Court of Claims:

The claimant respectfully represents and shows:

I. Claimant is a citizen of the United States, and a resident of the State of New York.

II. Claimant was employed in the service of the United States as an Assistant Weigher of Customs in and for the Port of New York prior to the month of March, 1909. During said month of
2 March, 1909 claimant was promoted to the office of United States Storekeeper in and for the said Port of New York at a compensation of Fourteen Hundred ($1400) dollars per annum. On or about the 10th day of January, 1910, claimant was further promoted as such United States Storekeeper to a compensation of Sixteen Hundred ($1600) dollars per annum. Before entering upon the performance of his duties under and by virtue of the aforesaid appointments, claimant took the usual oath of office required therefor. These aforesaid appointments were made by the Secretary of the Treasury upon the nomination of the Collector of the Port of New York.

III. On or about the 9th day of May, 1910, claimant was suspended from duty and pay to take effect at the close of business on said day, by the Collector of Customs for the Port of New York. This said suspension was made pending an investigation of certain charges made against claimant to the effect that he had participated in underweighing frauds against the United States. Claimant was directed to put in an answer to said charges within three days from the receipt thereof. Under date of May 11th, 1910 claimant submitted an answer denying said charges. This answer of claimant's was sworn to before a notary public in and for the County of New York. On May 26th, 1910 claimant was removed from his position as United States Storekeeper on the ground that he had participated in the underweighing of dutiable merchandise at the said Port of New
3 York, as alleged in the charges given to claimant on the 9th day of May, 1910.

IV. Claimant repeatedly protested to various officials in the Cus-

toms Service against his removal from the Service, and made re-
peated efforts to obtain a hearing upon the said charges before the
decision thereupon. Thereafter claimant made frequent requests
for a reconsideration of the charges that led to his removal, and at
various intervals requested his reinstatement.

V. Despite repeated efforts made by claimant, for reconsideration
of said charges, no action was taken thereupon by the Treasury De-
partment, except to re-affirm the previous determination.

VI. Claimant finally appealed to the Attorney General of the
United States for a reconsideration of the evidence that was furnished
by the said Attorney General to the Collector of the Port of New
York, and which led to claimant's removal, as aforesaid, and as a re-
sult of said appeal, the said Attorney General caused an investigation
to be made during the month of May, 1912. As result of this in-
vestigation, it developed that claimant had been unjustly charged
with participation in under-weighing frauds, and that he had been
unjustly removed from the service of the United States. Under date
of June 11th, 1912, the said Attorney General of the United States
addressed a letter to the Secretary of the Treasury recommending
claimant's restoration to the office from which he had been
4 dismissed. No action was taken thereupon until the case was
called to the attention of the President of the United States in
October, 1912, who caused a further investigation to be made, and
upon the completion thereof, issued an executive order as follows:

"Mr. Louis H. Eberlein may be reinstated to any appropriate
classified position in the Customs Service at New York without regard
to the length of time he has been separated from the service. Mr.
Eberlein was separated from the service on May 26, 1910, on a charge
of accepting money from importers and under-weighing dutiable
merchandise. Upon a rehearing of the case by the Surveyor of Cus-
toms at New York the opinion was reached that neither the charge
as a whole nor any specification had been sustained, and in view of
Mr. Eberlein's previous good record a recommendation was made that
the charges be dismissed.

The Attorney General, after review of the case, stated that he
deemed it a case where an honest man suffered from the general
atmosphere of his surroundings, and that the recommendations of the
Surveyor of Customs should be acted upon and Mr. Eberlein re-
stated.

The Department reached the conclusion that Mr. Eberlein's dis-
missal from the service was not justified and that his reinstatement
would be in the interests of good administration.

The Civil Service Commission joins in recommending this order.

(Sgd.) WM. H. TAFT

The Whitehouse, December 3, 1912."

5 VII. Claimant was, by virtue of his appointment, an em-
ployee of the Civil Service of the United States, at all times
hereinbefore and hereinafter mentioned, under the Act of Congress
of January 16th, 1883, known as the Civil Service Law.

VIII. During all the time from the date of claimant's unjust suspension on May 9th, 1910, as heretofore alleged, to the 16th day of December, 1912 when claimant was restored to his position as United States Storekeeper at Sixteen Hundred ($1600) dollars per annum, claimant stood ready, willing and able to perform the duties of the office to which he had been lawfully appointed and from which he was unlawfully separated. Claimant avers that during all this time he was prevented from performing the duties of his said office by direction of the Secretary of the Treasury or his subordinates.

IX. Claimant avers that he was, and is entitled to the compensation of Sixteen Hundred ($1600) dollars per annum during all the time from May 9th, 1910 to December 15th, 1912, amounting to Four Thousand One Hundred Sixty-four and 44/100 ($4,164.44) dollars.

X. No action has been taken on this claim except that set forth in this petition.

XI. Claimant is the sole owner of this claim, no other person or corporation is interested therein, and no assignment or transfer of the claim or any part thereof, or interest therein has been made.

6

XII. Claimant is justly entitled to the amount herein named from the United States, as he is advised and believes, after allowing all just credits and set-offs.

Wherefore, he prays judgment against the United States in the sum of Four Thousand One Hundred Sixty-four and 44/100 ($4,164.44) dollars.

SPOOR & RUSSELL,
Attorneys of Record.

DUDLEY & MICHENER,
Of Counsel.

7

STATE OF NEW YORK,
County of New York, ss:

Personally appeared before me, a notary public, in and for the County of New York, William E. Russell, who being sworn according to law, deposes and says: that he is a member of the partnership of Spoor & Russell, which partnership has been duly authorized by power of attorney, to represent the claimant and verify pleadings in this case; that he has read and understands the foregoing petition, and that the matters and things therein stated are true in substance and in fact, as he is informed and believes.

WILLIAM E. RUSSELL.

Subscribed and sworn to before me this 24th day of May, 1916.

[SEAL.] E. E. LEVINE,
Notary Public, Kings Co.

Cert. filed N. Y. Co. County Clerk's Nos.: Kings Co. 77; N. Y. Co. 230. Register's Nos.: Kings Co. 8081; N. Y. Co. 8200.

Commission expires March 30, 1918.

8 II. *General Traverse.*

Court of Claims.

No. 33266.

LOUIS H. EBERLEIN

vs.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damage demand, or defense in the premises, having been entered on the pa of the defendants, a general traverse is entered as provided by Ru 34.

III. *Argument and Submission of Case.*

On March 6, 1918 this case was argued and submitted on meri by Mr. W. E. Russell, for the claimant, and Mr. Harvey D. Jaco for the defendants.

9 IV. *Findings of Fact, Conclusion of Law, and Opinion of th Court by Booth, J., in which Hay, J., Downey, J., Ba ney, J., and Campbell, Ch. J., Concur. Entered May 2* 1918.

This case having been heard by the Court of Claims, the court, upo the evidence, makes the following

Findings of Fact.

I.

Claimant is a citizen of the United States and a resident of th State of New York.

II.

Plaintiff was an assistant weigher in the customs service at th port of New York prior to the month of March, 1909. During th said month of March, 1909, he was duly promoted to the office United States storekeeper, at a compensation of $1,400 per annu He was further promoted as such United States storekeeper on Jan ary 10, 1910, to the compensation of $1,600 per annum.

III.

At the close of business on the 9th day of May, 1910, plaintiff w suspended from duty and pay by the collector of customs at the po

of New York, pending an investigation of written charges preferred against claimant, accusing him of participating in underweighing frauds. Plaintiff was allowed three days to answer the charges and submitted a sworn answer under date of May 11, 1910, denying each and every one of said charges. He was removed from the service on May 26, 1910, by the Secretary of the Treasury upon the recommendation of the collector of customs on the ground that he had participated in the underweighing frauds, as charged.

IV.

Plaintiff duly protested against his removal and made several efforts to obtain a hearing upon the charges prior thereto. After his removal plaintiff made frequent requests for a hearing, for a reconsideration of the charges, and for reinstatement. These various requests were denied by the Treasury Department.

10 V.

Plaintiff finally appealed to the Attorney General of the United States for a reconsideration of the evidence that was furnished by the said Attorney General to the collector of the port of New York, and which led to claimant's removal, as aforesaid, and as a result of said appeal the said Attorney General caused an investigtion to be made during the month of May, 1912. As a result of this investigation, it developed that plaintiff had been unjustly charged with participation in underweighing frauds. Under date of June 11, 1912, the said Attorney General of the United States addressed a letter to the Secretary of the Treasury recommending plaintiff's restoration to the office from which he had been dismissed. No action was taken thereupon until the case was called to the attention of the President of the United States in October, 1912, who caused a further investigation to be made, and upon the completion thereof issued an Executive order, as follows:

"Mr. Louis H. Eberlein may be reinstated to any appropriate classified position in the customs service at New York without regard to the length of time he has been separated from the service. Mr. Eberlein was separated from the service on May 26, 1910, on a charge of accepting money from importers and underweighing dutiable merchandise. Upon a rehearing of the case by the surveyor of customs at New York the opinion was reached that neither the charges as a whole nor any specification had been sustained, and in view of Mr. Eberlein's previous good record recommendation was made that the charges be dismissed.

"The Attorney General, after review of the case, stated that he deemed it a case where an honest man suffered from the general atmosphere of his surroundings, and that the recommendations of the surveyor of customs should be acted upon and Mr. Eberlein reinstated.

"The department reached the conclusion that Mr. Eberlein's dis-

missal from the service was not justified and that his reinstatement would be in the interest of good administration.

"The Civil Service Commission joins in recommending this order.

"(Sgd.) WM. H. TAFT.

"The White House, December 3, 1912."

VI.

Claimant was an employee in the customs service under the classified civil service.

VII.

If plaintiff is entitled to the salary of his office as United States storekeeper at the rate of $1,600 per annum from May 9, 1910, to December 15, 1912, the same would amount to $1,164.44.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the petition herein should be and the same is
11 hereby dismissed, and judgment is rendered in favor of the United States against the plaintiff for the cost of printing the record in this cause in the sum of thirty-six dollars and sixty-five cents ($36.65) to be collected by the clerk as provided by law.

Opinion.

BOOTH, *Judge*, delivered the opinion of the court.

The plaintiff, Louis H. Eberlein, held the office of United States storekeeper in the customs service in and for the port of New York; he had been advanced to this position through two promotions. On May 9, 1910, the plaintiff was suspended from duty without pay, to take effect at the close of the above business day. The cause for his suspension was the preferment of certain charges wherein he was alleged to have been involved in the underweighing frauds perpetrated by certain customs officials against the United States. The charges made were extremely serious, both from a moral and legal view, and if proven convicted him of having accepted money bribes from certain importers to underweigh cargoes of sugar and thereby defraud the Government. The plaintiff answered the charges in writing and under oath specifically denied guilt, asserting with much positiveness that as to him the charges were a mistake. On May 26, 1910, plaintiff was removed from office because of said charges. In May, 1912, two years subsequent to his removal, plaintiff induced the Attorney General of the United States to reinvestigate his record. The Attorney General after a careful and detailed investigation did, on June 11, 1912, report in writing to the Secretary of the Treasury in effect that the charges were not sustained and the plain-

iff should be reinstated. Mr. Nelson M. Henry, surveyor of the ort, on June 5, 1912, made to the collector of customs a similar eport after an investigation. On December 3, 1912, President Taft, y an Executive order of that date, and in pursuance of a still further nvestigation of the matter, directed the reinstatement of the plaintiff, nd on December 16, 1912, the collector did reinstate him in his ormer position. This suit is to recover the salary of the office held y the plaintiff from the date of his removal therefrom to the date f his reinstatement.

Article 1385 of the Customs Laws and Regulations of 1908 pro- ides as follows:

"Subordinate customs officers are removable by the Secretary of he Treasury. The name of any subordinate officer whose removal s deemed necessary or proper is to be reported to the Secretary of he Treasury, with a full statement of the reasons therefor, and no emoval shall be made from any position subject to competitive ex- mination except for just cause and upon written charges filed with he head of the department or with another appointing officer, of hich the accused shall have full notice and an opportunity to make efense."

There are certain features of the case which are admitted. The laintiff was an appointee in the classified service and the office he eld was likewise subject to said service. The innocence of the plain- iff must also be conceded, not that it is by the defendants; neverthe- less the record precludes a contrary assertion. It is also ap- 2 parent that the proceedings followed to remove and subse- quently reinstate the plaintiff were regular and followed the aw. The officers of the defendants participating therein were duly uthorized and empowered to do the things they did do. With these eatures of the case removed from consideration the issue is narrowed nd we are alone to determine whether the reinstatement of the plain- ff operated to continue him in office during the period of his re- oval.

The intent and spirit of the civil service law and the regulations romulgated thereunder need at this time no elaboration. The plain- ff was removed in accord with their provisions, and the question s to just cause was left with the executive authorities, the courts ealing alone with any departure from the law itself. The discre- onary power of the executive officer authorized to act is final and ot subject to review by the courts. Keim v. United States, 177 . S., 290.

In so far as cited authorities extend the instant case seems sui eneris. If the civil service law has been complied with the courts re prevented from going further. The plaintiff received the full easure of his rights under the law; he was accorded all the priv- eges it extends, and his removal from office was in strict accord herewith. The charges resulting in his removal from office were referred in writing, his answer thereto in writing was duly filed, nd the record thus made was before the proper officer for his final ction. The officer removed him and from his decision there was no irect appeal provided by law. The proceedings subsequent to his

lawful separation from office simply reinstated him in the classified service, made him eligible to appointment and subsequently resulted in his reinstatement in the Government service. The word "reinstatement" was used, but not in a strict technical sense as intending to nullify all that had been done before and return the plaintiff to his exact former state in the service. The final action by the President reinstated the plaintiff in the classified service, not the Government service; it would hardly be contended that if no position had then been open for the appointment of the plaintiff he would in virtue of the President's proclamation have been entitled to the position from which he had been removed. The charges upon final review were found to have been without merit. The record convinced the officers having charge thereof that a wrong had been done the plaintiff, and the righting of the wrong found expression in the public proclamation of the President. The plaintiff's removal was in effect set aside and he himself restored to eligibility in the Government service despite the lapse of time and whatever intervening obstacles obstructed his path by reason of the charges made against him. It did not and was not intended to convert his removal into a mere suspension from duty. The legal effect was not to nullify his lawful removal, but to set aside and render him eligible to again be appointed to the office from which he had been removed. An Executive act was indispensable, without which the plaintiff was ineligible for appointment to any position in the classified service.

The petition is dismissed. It is so ordered.

Hay, Judge; Downey, Judge; Barney, Judge, and Campbell, Chief Justice, concur.

13 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Twenty-seventh day of May, A. D. 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge and decree that Louis H. Eberlein, as aforesaid is not entitled to recover and shall not recover any sum in this action of and from the defendants, the United States; and that the petition be and it hereby is dismised: And it is further ordered, adjudged, and decreed that the defendants, the United States, shall have and recover of and from the claimant, Louis H. Eberlein, as aforesaid, the sum of Thirty-six dollars and sixty-five cents ($36,65), the cost of printing the record in this cause in this court, to be collected by the Clerk, as provided by law.

By the COURT.

VI. *Proceedings Had After Entry of Judgment.*

On June 5, 1918 the claimant filed a motion to amend the court's findings of fact. On June 17, 1918 this motion was overruled by the court.

VII. *Claimant's Application for and Allowance of an Appeal.*

Comes now the claimant and makes application for an appeal to the Supreme Court of the United States.

SPOOR & RUSSELL,
Attys. of Record.

Filed July 12, 1918.

Ordered: That the above appeal be allowed as prayed for.

EDWARD K. CAMPBELL,
Chief Justice.

July 16, 1918.

14 Court of Claims.

No. 33266.

LOUIS H. EBERLEIN

vs.

THE UNITED STATES.

I, Saml. A. Putman, Chief Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusions of law, and opinion of the court by Booth, J.; of the judgment of the court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 16" day of July, A. D. 1918.

[Seal Court of Claims.]

SAML. A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,652. Court of Claims. Term No. 566. Louis H. Eberlein, appellant, vs. The United States. Filed July 18th, 1918. File No. 26,652.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. [redacted]12

LOUIS H. EBERLEIN,

Appellant,

against

THE UNITED STATES.

Appellant's Brief

WM. E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

Supreme Court of the United States

OCTOBER TERM, 1919.

LOUIS H. EBERLEIN, Appellant, vs. THE UNITED STATES.	No. 170.

APPELLANT'S BRIEF.

Statement of the Case.

1.

This is an appeal from a judgment of the Court of Claims dismissing appellant's petition. Louis H. Eberlein, the appellant, was appointed a United States Storekeeper in the customs service at the port of New York on March 1st, 1909, having prior thereto been an assistant weigher of customs. Both of these positions were under the classified civil service. He received the salary of $1,400 per annum upon his appointment as storekeeper but was promoted to $1,600 per annum on January 10th, 1910. He continued to hold this

position until May 9th, 1910, when he was suspended from duty and pay under charges that he had accepted money from importers in 1904 for underweighing dutiable merchandise. Written charges were served upon him at the time of his suspension and he was allowed three days in which to submit his answer thereto. He submitted a sworn answer on May 11th, 1910, denying each and every one of the charges and requested a hearing. A hearing was denied him and he was removed from the service on May 26th, 1910 (R., 4, 5, 6).

2.

The charges against Eberlein were preferred by the Collector of Customs at the instance of the Attorney-General's office, then investigating the "sugar frauds" in the port of New York. Prior to, and after his removal, appellant made repeated efforts to obtain a hearing, strenuously asserting and offering to prove that he was entirely innocent of the charges. He met with no success, however, as the Treasury Department refused to grant the hearing requested. He filed applications for re-instatement but was unable to make any progress until he succeeded in getting his case presented to the then Attorney-General, Hon. George W. Wickersham. Upon the recommendation of the latter, a hearing was finally accorded appellant before the Surveyor of Customs of the port of New York during the month of May, 1912. Then and there, appellant established his innocence and the Surveyor so found and reported to

the Treasury Department and to the Attorney-General. On June 11th, 1912, the Attorney-General addressed a letter to the Secretary of the Treasury advising that a mistake had been made in Eberlein's case and recommending his re-instatement. No action was taken upon this recommendation and the case was finally brought to the attention of the President in October, 1912, who caused a further investigation to be made and, upon the completion thereof, issued an Executive order directing the re-instatement of appellant. The re-instatement to his position as storekeeper took place on December 16th, 1912 (R., 5, 6, 7).

3.

This suit was thereafter brought for the recovery of the salary of the office of storekeeper during the period of removal, at the rate of $1,600 per annum, this being the salary received by appellant at the time of both the removal and the re-instatement. The amount thereof is $4,164.44 (R., 1-6).

4.

There is really only one question presented for review to this Court. The record shows conclusively and beyond controversy that appellant was removed by the proper authority, the appointing power, and in accordance with the rules of procedure. The record is equally convincing that the

appointing power, subsequent to the removal, *reviewed its own prior act* (a right unquestionably possessed) and decided that appellant had been wrongfully and unjustly removed from the service and thereupon re-instated him. The question is, therefore: Is appellant entitled, by virtue of his acquittal of the charges and his re-instatement to his position, to the salary of his office during the period of removal? Or to put the query another way. Did the re-instatement restore the title and rights of his office to appellant, *ab initio?* We must bear in mind that appellant was *re-instated* and not *re-appointed*.

This court is not being called upon in any way to review the exercise of a discretionary power by the executive branch of the government. That branch did its own reviewing in the instant case but it lacked the power to restore to appellant anything more than the title to his office. The emoluments thereof may only be restored by the Courts or possibly by the legislative branch. The injury to the good name and reputation of appellant, suffered by him as the inevitable result of his removal on charges so serious, can never be remedied by any power of the government.

The Record Below.

The petition was filed in the court below on May 25th, 1916 (R., 1). A general traverse to the petition was duly entered (R., 4). The case was argued and submitted on March 6, 1918 (R., 4). Findings of fact and conclusions of law and opinion of the court were filed on May 27, 1918 (R.,

4). Petition was dismissed on May 27, 1918 (R., 8). Appellant filed a motion on June 5, 1918, to amend the findings (R., 8). On June 17, 1918, motion to amend findings was overruled (R., 8). Application for appeal was made on July 12, 1918, and allowed July 16, 1918 (R., 9).

Assignment of Errors.

The court below erred:

1. In dismissing the petition.

2. In not rendering judgment for the petitioner in the sum of $4,164.44.

BRIEF OF ARGUMENT.

I.

Appellant was unjustly removed.

The rules of procedure governing removals were followed in this case, but, nevertheless, there was no just cause for removal.

It is not contended on behalf of appellant that any rule or regulation was violated in the proceedings that led to his separation from the service. While it is true that he was denied a hearing upon the grave charges made against him, yet it was discretionary with the appointing power to grant or refuse same. We take no exception to this refusal, as we recognize the rule that the courts will not review the exercise of a discretionary power by the executive branch of the Gov-

ernment. However, in this case, the appointing power *reviewed its own act* and in the face of irrefutable evidence decided that appellant had been unjustly removed from the service and thereupon reinstated him to his former position.

Article 1385 of the Customs Laws and Regulations of 1908 provides in part "no removal shall be made from any position subject to competitive examination except for *just cause*" (italics ours). Had Eberlein not been reinstated, it is conceded that the courts would not have intervened in his behalf because to have done so would have necessitated the review of an administrative act. The fact is, though, that he was reinstated by the same power that removed him. It may be that the appointing power thought that there was "*just cause*" at the time of the removal, but it is to be remembered that this same power later *established and found as a fact* that there was no *just cause*—that a grievous mistake had been made—that an innocent man had suffered from the general atmosphere of his surroundings, as the Attorney General expressed it. We think it follows that the removal was unlawful because it was unjust. We think that the word "lawful" imports something more than a mere compliance with regulated procedure—that it refers to the substance and not simply to the form, as the court below seems to argue. We find it difficult to believe that a removal may be unjust but lawful—to so believe implies that law and justice do not go hand in hand. The court below says "the innocence of the plaintiff must also be conceded, not that it is by the defendants; nevertheless, the record precludes a contrary assertion" (R., 7).

II.

Appellant was reinstated and not reappointed.

Had appellant received a reappointment instead of a reinstatement a different question might be presented.

The record is clear that appellant was reinstated and not reappointed. The difference between the two words is manifest. The first imports a restoration to the *same* status enjoyed previous to the removal. The latter does not convey the same idea at all. A reappointment might be to a different position altogether. In this case Eberlein was reinstated and by the same Secretary of the Treasury who had previously removed him. We take it that the order of reinstatement restored to appellant the legal title to his office which had been unjustly taken from him and swept his whole record clear of the charges and their consequences. To give him back his office merely and to deny him the right to the salary that was attached thereto as an incident thereof would not amount to a restoration. Through no fault of his own, this appellant was prevented for more than two years from performing the duties of his office, but his right to the emoluments thereof was established when he was reinstated.

III.

Appellant is entitled to the salary of his office during the period of removal.

The salary of a public office is payable, not by force of any contract, but because the law attaches it to the office and he who holds the legal title thereto is entitled to the salary as an incident thereof.

The court below holds that this case seems to be *sui generis*. We do not agree with this view and submit that the case of *Fitzsimmons* vs. *Brooklyn*, 102 N. Y., 536, is in point. In the *Fitzsimmons* case the plaintiff was a public officer and was removed by his superior officer on grounds considered good and sufficient. The plaintiff was restored to his office by *certiorari* proceedings, it being held that he had been unjustly removed. During the period of removal this plaintiff secured employment elsewhere and earned a considerable sum of money. Upon being reinstated he brought suit for the salary of his office accruing during the period of removal. The defendant, the City of Brooklyn, attempted to urge set-off to the extent of moneys earned by the plaintiff in other employment during the period of removal. The Court of Appeals of the State of New York in affirming the judgment in favor of the plaintiff said, at page 538:

> "But this rule of damages has no application to the case of an officer suing for his salary and for the obvious reason that there

is no broken contract or damages for its breach where there is no contract. We have often held that there is no contract between the officer and the State or municipality by force of which the salary is payable. That belongs to him as an incident of his office, and so long as he holds it; and when improperly withheld he may sue for it and recover it. When he does so he is entitled to its full amount, not by force of any contract; but because the law attaches it to the office; and there is no question of breach of contract or resultant damages out of which the doctrine invoked has grown. We think, therefore, it has no application to the case at bar, and the courts below were right in refusing to diminish the recovery by applying the wages earned."

This Fitzsimmons case is one of the leading cases on the point under discussion and has been widely cited and followed in the various jurisdictions throughout the United States.

O'Neil vs. *State*, 223 N. Y. 40.
People vs. *Board of Police Commissioners*, 114 N. Y. 245.
Emmitt vs. *The Mayor*, 128 N. Y. 117.
Leonard vs. *The City of Terre Haute*, 93 N. E., 872.
Andrews vs. *City of Portland*, 79 Me. 484.
State vs. *Walbridge, et al.*, 153 Mo., 194.
Evevill vs. *Swan*, 20 Utah, 56.

This court has also heretofore held that the salary of a public office is an incident thereof:

Fisk vs. *Jefferson Police Jury*, 116 U. S., 131.

In fact this rule seems to be unquestioned:

28 Cyc. 449;
29 Cyc. 1367 and 1422.

In the instant case the appellant was restored to his office by the same Secretary of the Treasury who removed him. Thus it appears that there was a complete review of the first act and the decision was reached that appellant had been unjustly removed. Once again we submit that there is no question before this court involving the review of an administrative act. We recognize that the rule laid down by this Court in *Keim* vs. *U. S.*, 177 U. S. 290, has not been disturbed.

It is true that this appellant was restored to his office but the wrong done him has never been remedied; it will not be wholly remedied even with the return to him of the compensation belonging to his office for there was an injury done to his reputation that cannot be compensated for. However, this Court has the power, we take it, to give this appellant the salary of his office and that, in order to do so, it is only necessary to hold that his re-instatement by executive order intended and did restore to him the legal title to his office from the date of his removal. This would entitle him to all of the privileges or emoluments attached thereto.

WHEREFORE it is respectfully submitted that the judgment of the court below should be reversed and that appellant should recover the salary of

his office for the period elapsing between May 9, 1910 and December 15, 1912, at the rate of $1,600.00 per annum, amounting to $4,164.44.

Respectfully submitted,

WM. E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

No. [redacted]12

In the Supreme Court of the United States

OCTOBER TERM, 1920.

LOUIS H. EBERLEIN, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1921

In the Supreme Court of the United States

OCTOBER TERM, 1920.

LOUIS H. EBERLIEN, APPELLANT,
v.
THE UNITED STATES.
No. 49.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The material facts in this case can be stated briefly. Appellant entered the Government service as an assistant weigher and in March, 1909, was promoted to the position of storekeeper at $1,400 per annum. Later, on January 10, 1910, his salary was increased to $1,600 per annum. (R. Finding II, p. 4.)

On May 9, 1910, he was suspended from duty and pay pending an investigation of charges preferred against him. Appellant was afforded three days for answer, and after he had filed a sworn answer was removed by the Secretary of the Treasury on May 26, 1910, strictly in compliance with civil service rules then in force. (R. Finding III, p. 5.)

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In 1912 he succeeded in presenting his case to the Attorney General, who came to the conclusion that appellant had been unjustly accused of complicity in underweighing frauds in connection with the importation of sugar. (R. Finding V, p. 5.)

No action was taken until October, 1912, when the matter having been brought to the attention of President Taft, the President issued the Executive order set out in the findings, reinstating appellant "to any appropriate classified position in the customs service at New York without regard to the length of time" he was separated from the service. (R. Finding V, p. 5.)

ARGUMENT.

APPELLANT WAS EFFECTIVELY REMOVED FROM THE GOVERNMENT SERVICE ON MAY 26, 1910, AND THE EXECUTIVE ORDER OF THE PRESIDENT DID NOT RETROACTIVELY RESTORE HIM TO HIS OFFICE AS OF THE DATE OF HIS REMOVAL.

The findings show that appellant was removed from his position as storekeeper on May 26, 1910, by the Secretary of the Treasury upon the recommendation of the collector. Since the rules and regulations concerning removal were complied with and since the removal was made by the appointing authority, appellant was effectively removed from office. (*Burnap* v. *United States*, 252 U. S. 512, and cases cited at p. 515.) See also Customs Regulations, 1908, articles 1370 and 1371, under title "Appointments." The courts will not review the Secretary's decision. (*Keim* v. *United States*, 177 U. S. 290.)

But the tenor of appellant's argument is that, conceding the courts would not have reviewed the decision of the Secretary of the Treasury in removing him on May 26, 1910, still the President subsequently found that he was not guilty of the acts of which he had been charged, and reinstated him. Therefore it is argued that the original removal was not for "just cause," as provided in Customs Regulations, article 1385 (1908), and was no removal; and second, that the act of the President in reinstating him was retroactive, and amounted to an appointment as of the date of his removal. Consequently, it is contended that his salary for the period follows as an incident to his office. The position is untenable.

The entire argument is based on the premise that the President is the appointing power. Congress has expressly delegated the power of appointment of subordinate customs officers and employees to the Secretary of the Treasury (R. S. 2621, Comp. State. 1916, sec. 5359; act Feb. 6, 1907, c 471, 34 Stat. 880, Comp. Stat., sec. 5369; Customs Regulations, 1908, articles 1370 and 1371). The Constitution (Art II, sec. 2) authorizes Congress to vest the appointment of inferior officers either in the President alone, in the courts of law, or in the heads of departments. (*Burnap* v. *United States*, 252 U. S. 512–514.) An original appointment or a reappointment of appellant by the President would then have been without authority of law.

It was said by Mr. Justice Thompson in *ex parte Hennen* (13 Peters, 135–139):

> In all of these departments (State, War, Treasury, and Navy) power is given to the Secretary to appoint all necessary clerks. (1 Story, 48.) And although no power to remove is expressly given, yet there can be no doubt that these clerks hold their office at the will and discretion of the head of the department. It would be a most extraordinary construction of the law, that all these offices were to be held during life, which must inevitably follow, unless the incumbent was removable at the discretion of the head of the department; *the President has certainly no power to remove.*

The only portion of the President's order material to a decision of the case is the following:

> Mr. Louis H. Eberlien may be reinstated to any appropriate classified position in the customs service at New York without regard to the length of time he has been separated from the service.

To argue that the word " reinstate " means to reappoint appellant as of the date of his removal or at any date is to construe the Executive order as an attempt on the President's part to make an appointment which he was without authority in law to make. (*Burnap* v. *The United States, supra; United States* v. *Mouat*, 124 U. S. 303.) The findings do not show who, if anybody, reappointed appellant to a new position in the

customs service, although the opinion in the court below says he was "reinstated" by the collector. But if he resumed a position in the customs service by virtue of this presidential order, he was a *de facto* officer only, unless by acquiescence on the part of the Secretary of the Treasury his reappointment became *de jure*.

It seems clear from the foregoing that appellant, having been legally and effectually removed from the service on May 26, 1910, ceased to be an officer and that no salary was due him as incident to his office. It is also shown that the President had no power of appointment and therefore no consequential power of removal. So, even when the President concluded that appellant had been removed on charges of which he was not guilty, he had no more power than the courts would have to declare the removal void or to reappoint the officer, where the Secretary, in removing the officer, complied with all statutory provisions. (*Keim* v. *United States*, 177 U. S. 290.)

But the letter of the President was not a vain thing. It is found as a fact that appellant was in the classified civil service. The law provides (R. S. 1753, Comp. Stat. 1918, sec. 3213):

> The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof. * * *.

By the act of January 16, 1883, chap. 27 (22 Stat. 403), Comp. Stat. 1918, sec. 3271 *et seq.* the Civil Service Commission was created to make regulations for open competitive examinations for classified positions. It was directed that after six months from the passage of the act no appointment should be made until after an examination (Comp. Stat. 1918, sec. 3278), but the provision was made subject to the power of the President to make regulations, not inconsistent with the act, according to R. S. 1753 *supra.*

Pursuant to these acts, civil-service Rule IX was promulgated. (Report Civil Service Commission, 1912–13, p. 80.)

> A person *separated* without delinquency or misconduct from a competitive position, or from a position which he entered by transfer or promotion from a competitive position, may be *reinstated* in the department or office in which he formerly served, upon certificate of the commission, subject to the following limitations:
>
> *a.* The *separation* must have occurred within one year next preceding the date of the requisition of the nominating or appointing officer for such certificate; * * *
>
> *b.* No person may be reinstated to a position requiring an examination different from that required for the position from which he was *separated.* * * *

The conclusion is therefore clear that when President Taft used the word "reinstate" it had a very definite meaning, and not the meaning which appellant accords it. In Rule IX *supra*, the word as used presupposes a *separation* from the service. A person separated from his position, then, "without delinquency or misconduct," could be appointed to a like position without the requirement of passing an examination, as required by the civil-service act. Since this Rule IX limits the period of reinstatement to one year, and since the President found that appellant had been removed without delinquency or misconduct, it required an Executive order, which the President clearly had power to issue, to make appellant eligible for appointment to a classified position after he had been separated from his position longer than that time.

Clearly this was the rule President Taft had in mind when the order was issued, for it is the only construction which can be placed on this language.

> Mr. Louis H. Eberlien may be reinstated to *any* appropriate *classified position* in the customs service at New York *without regard to the length of time he has been separated from the service.*

Since it is clear that appellant was legally separated from the service and that the Executive order had no further effect than to avoid the necessity of an examination to make him eligible for an appointment to any classified civil service

position in New York, it follows that appellant was not an officer of the Government during the period sued for, and consequently has no legal right to the salary of an office which he did not hold.

CONCLUSION.

It is therefore submitted that since appellant was removed from his position by the power who appointed him, and since the removal was strictly in compliance with civil-service rules, there can be no doubt that he was effectively separated from the service. Since the President did not have the power of appointment, he had no power in the premises other than to waive the civil-service rules concerning eligibility for appointment to a Federal position, governed by said rules, and to request the Secretary of the Treasury to appoint appellant to a position in the customs service. A construction of the President's letter shows he attempted to do nothing else. There is therefore no theory upon which the officer can recover for the period when he was out of the service and was neither an officer *de jure* nor *de facto*.

Respectfully submitted.

FRANK DAVIS, JR.,
Assistant Attorney General.

WILLIAM D. HARRIS, *Attorney.*

FEBRUARY, 1921.

○

Supreme Court of the United States

OCTOBER TERM, 1920.

No. [illegible]12

LOUIS H. EBERLEIN,

Appellant,

against

THE UNITED STATES.

APPELLANT'S REPLY BRIEF

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

Supreme Court of the United States,

OCTOBER TERM, 1920.

LOUIS H. EBERLEIN,
Appellant,
against
THE UNITED STATES.
No. 49.

APPELLANT'S REPLY BRIEF.

I.

Opposing counsel's argument (pp. 2-8) is based upon the assumption that our contention is that the President is the appointing power and that he ordered appellant's reinstatement. This is an error. We have not made any such contention. On the contrary, our position is (pp. 5, 6, 7 and 10) that the Secretary of the Treasury is the appointing, removing and reinstating authority and so we are in harmony with the argument of the defense on this point. The President's order (R. foot of p. 5) was permissive in form "may be reinstated", etc. The Secretary of the Treasury acted on the permission so given and restored appellant to his former position. The Executive order, R. 2, distinctly states in the last paragraph but one, "the *Department reached the conclusion that Mr. Eberlein's dismissal from the service was not justified and that his reinstatement would be in the interests of good administration.*" Clearly, this indicates that the

Secretary of the Treasury, the appointing power, was the one who finally determined that Eberlein was innocent. The Executive order did not purport to restore Eberlein to his office and no such contention is made by the appellant. As stated in the brief of the United States, the effect of the Executive order was to waive a civil service rule which prevented a restoration to office where the incumbent had been separated therefrom for more than a year. Eberlein was restored to duty by the direction of the appointing power. It is true that the Court of Claims, in its opinion (R. 7) states that the President directed the reinstatement of the plaintiff, but we take it that the court below did not intend to hold that Eberlein was restored solely by virtue of the Executive order and without the intervening act of the appointing power, the Secretary of the Treasury. It is likewise true that the President reached the conclusion that Eberlein was innocent, but he merely restated the views of the appointing power. We find no quarrel with the defendant's argument that the power of removal is incident to the power of appointment and that the power of appointment of subordinate customs officers and employees is vested in the Secretary of the Treasury. The defense proceeds upon the theory that Eberlein was reappointed and not reinstated. It may well be that the word "reinstated" was used in the Executive order in a loose sense, but whatever may have been the intent in the use of this word, the fact remains, as the record discloses, that Eberlein was restored to duty pursuant to a proper direction from the appointing power.

II.

Eberlein was restored to his "former position" (R. 7) by the Collector of Customs. It must be presumed that the Collector acted within the authority of his office. He is, by law, the proper nominating officer for the customs service (Article 1370, Customs Laws and Regulations of 1908). It is to be noted that Eberlein was restored to his *former position* and not to some other position. He was not required to take a new oath of office but was merely placed on active duty again. He was treated as a suspended employee only, for, had he been regarded as a new appointee, a new oath of office would have been required of him.

III.

The salary of his office was not paid to any other incumbent so far as the record shows, and the inference is that the office was vacant during the entire two years of his separation from the service. The petition (R. 3, top of page) alleges that on "the 16th day of December, 1912 claimant was restored to his position as United States storekeeper at $1600.00 per annum". Finding VII, R. 6, is as follows:

> "If plaintiff is entitled to the salary of his office from May 9th, 1910 to December 15th, 1912, the same would amount to $4164.44."

Thus the court excluded December 16th, 1912, the date of restoration, and named dates that cover the period between the removal and the date of

restoration, taking pains to exclude the latter date in order that Eberlein would not get two days' pay for December 16th, 1912. Thus the court below fixed the period in which claimant had not drawn pay.

We submit that this finding fixes the date of restoration, especially when we recognize the fact that the Secretary would naturally, inevitably and promptly act in accordance with the President's permission, as the Secretary had previously established and found, as a fact, that Eberlein had been removed without *just cause*. The Court of Claims would not have computed the salary down to December 15th, 1912, if there had not been restoration on the following day, but we are not left in doubt on that point for it is stated in the opinion (top of page, R. 7) as follows:

> "On December 3rd, 1912, the President, by an Executive order of that date, and in pursuance of a still further investigation of the matter, directed the reinstatement of the plaintiff, and, on December 16th, 1912, the Collector did reinstate him in his former position. This suit is to recover the salary of the office held by the plaintiff from the date of his removal therefrom to the date of his reinstatement."

This clarifies the finding and makes conclusive our interpretation of it. The court below states that the "Collector did reinstate him in the former position". Of course, that was done in harmony with Article 1370 of the Customs Laws and Regulations of 1908 authorizing the Collector to act by permission of the Secretary of the Treasury. We take it that this court will presume that all

things were done in harmony with the law, in the absence of facts showing the contrary. It is true that the record does not disclose a precise direction from the Secretary of the Treasury to the Collector to restore Eberlein to his former position, but it does appear that he was so restored by the proper nominating officer, the Collector of Customs, and, applying the presumption above stated, it follows that Eberlein was restored by the Secretary of the Treasury.

Conclusion.

Since the causes for Eberlein's removal were reviewed by the appointing power and it was found that there was no just cause for removal, it follows that this appeal presents no question of reviewing the acts of an administrative official in the discharge of his duties; since Eberlein was restored to his former position without being required to execute a new oath of office, it follows that his restoration carried with it the title to the office *"ab initio"*; and, since the salary of his office was not paid to another incumbent, it follows that Eberlein is entitled to the same, as the salary is an incident of the office. We, therefore, submit that Eberlein is entitled to judgment for the amount mentioned in Finding VII, R. 6; namely, $4164.44.

Respectfully submitted,

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

EBERLEIN *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 12. Argued October 5, 1921.—Decided November 7, 1921.

E, having been removed by the Secretary of the Treasury from a place in the customs service after due hearing upon charges, was later reinstated by the same authority, pursuant to an order of the President based on further investigation and findings that the charges were not just.

Held: (1) That the removal was an act of discretion not subject to revision by the court. P. 84.

(2) That the power of appointment and removal in the case was constitutionally lodged in the Secretary of the Treasury; the President's order could not and was not intended to operate as a reinstatement, but merely restored E's eligibility to appointment. P. 84.

(3) E had no claim to the salary between the dates of his removal and his reinstatement by the Secretary.

53 Ct. Clms. 466, affirmed.

APPEAL from a judgment of the Court of Claims, in an action to recover salary accruing between the dates of appellant's removal from an office and his reinstatement. See also, *ante*, 71, 77.

Mr. William E. Russell, with whom *Mr. L. T. Michener* and *Mr. P. G. Michener* were on the briefs, for appellant.

Mr. Assistant Attorney General Riter, *Mr. Assistant Attorney General Davis* and *Mr. William D. Harris*, for the United States, submitted.

MR. JUSTICE DAY delivered the opinion of the court.

In this case the plaintiff, who was a United States Storekeeper in the customs service at the port of New York, brought suit in the Court of Claims to recover from the United States the sum of $4,164.44, that being the salary of the office from the date of his removal therefrom to the date of his reinstatement. The Court of Claims decided against him. 53 Ct. Clms. 466. On May 9, 1910, he was suspended without pay pending an investigation of written charges preferred against him. He had a hearing upon his answer to the charges, and on May 26, 1910, was removed from office. The charges involved the acceptance of bribes in the matter of underweighing cargoes of sugar, and thereby defrauding the Government. In May, 1912, the Attorney General reinvestigated claimant's record, and reported that in his judgment the charges were

not sustained, and the Surveyor of the port made a similar report. On December 3, 1912, the President of the United States by an executive order of that date in pursuance of further investigation directed the reinstatement of the plaintiff. On December 16, 1912, he was reinstated.

There can be no question from the findings in this case that the plaintiff had the benefit of a hearing according to the regulations then in force. The Court of Claims in its opinion stated that the subsequent investigation established his innocence of the charges made against him. But the things required by law and regulations, were done, and the discretion of the authorized officers was exercised as required by law. It is settled that in such cases the action of executive officers is not subject to revision in the courts. *Keim* v. *United States*, 177 U. S. 290.

The order of the President could not have the effect of reinstating the plaintiff to the office from which he was removed. The power of appointment and removal was in the Secretary of the Treasury. It was within the power of Congress to confer this authority on the Secretary. *Burnap* v. *United States*, 252 U. S. 512.

The President's order, while reciting the wrong which had been done to the plaintiff, could have no more effect than to reinstate him to eligibility for reappointment in the Government service. Indeed, such was found to be the import of the order itself, and fairly so. It provides that Eberlein may be reinstated in any appropriate classified position in the Customs Service in New York, without regard to the length of time he has been separated from the service. That was the purpose of the order, although it goes on to say, doubtless in fairness to Eberlein, that he was separated from the service on May 26, 1910, and charged with having accepted money from importers for underweighing merchandise; that upon rehearing, the Surveyor of Customs of New York was of the opinion that

the charges had not been sustained, and that the Attorney General recommended that the plaintiff be restored to the office from which he had been dismissed. It is apparent that the President's order was intended to have no more effect than to restore him to eligibility for appointment. Such was the view of the Court of Claims, and we find no error in its judgment.

Affirmed.